



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VIII

999 18th STREET - SUITE 500
DENVER, COLORADO 80202-2466

September 30, 2003

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Ref: 8ENF-T

Robert Phillips and Teresa Phillips
3614 U.S. Highway 87
P.O. Box 54
Banner, Wyoming 82832

Re: Findings of Violation and Administrative
Order for Compliance

Dear Mr. and Mrs. Phillips:

Based on our review of all available information, EPA Region 8 has determined that you have violated Section 404 of the Clean Water Act, as amended (the "CWA"). The CWA requires that an authorizing permit be obtained from the U.S. Army Corps of Engineers (the "Corps") prior to the discharge of pollutants (*i.e.*, dredged or fill material) into waters of the United States. See 33 U.S.C. §1311. Waters of the U.S. include both surface waters and wetlands, as defined by 33 C.F.R. Section 328.3.

Specifically, you failed to obtain the appropriate authorization under the CWA for placement of dredged and fill material into waters of the United States. This violation occurred when you constructed 2 dams and reservoir impoundments along Rifle Creek in September and October, 2000. The dams and impoundments are generally located on your property in the western half of Section 20, Township 54, Range 83 West, in Sheridan County, Wyoming.

Enclosed is an EPA Administrative Order (the "Order"), which specifies the nature of the violations and describes the actions necessary for you to begin to come into compliance with the CWA. It requires you to immediately terminate any and all unauthorized discharges of dredged or fill material into Rifle Creek and to submit a plan for restoring Rifle Creek and the adjacent wetlands that may have been impacted by your activities to their pre-impact condition.

The authority for EPA's action is provided under Section 309(a)(3) of the CWA, 33 U.S.C. §1319(a)(3). The Clean Water Act requires the Administrator of EPA to take all



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appropriate enforcement action necessary to secure prompt compliance with the CWA and any Order issued thereunder. Section 309 of the CWA provides possible enforcement actions, including filing of a civil or criminal action, administrative penalty action, and/or debarment from Federal contracts and/or loans for any noncompliance with the CWA or an Order issued pursuant to the CWA. Please be advised that the issuance of this Interim Order does not preclude civil or criminal actions in the U.S. District Court pursuant to Sections 309(b) or (c) of the CWA, or assessment of civil penalties pursuant to Sections 309(d) or (g) of the CWA for the violations cited herein.

Please review the Order carefully. The most knowledgeable person about the technical issues related to this Order is Diane L. Sipe, Director, Technical Enforcement Program, Office of Enforcement, Compliance and Environmental Justice. Ms. Sipe can be reached at (303) 312-6391 should you have any questions. All questions and communications from counsel should be directed to Alicia Hoegh, Enforcement Attorney, at (303) 312-6876.

Sincerely,

SIGNED

Carol Rushin
Assistant Regional Administrator
Office of Enforcement, Compliance and
Environmental Justice

Enclosure

cc: Mark Pifher, CDPHE
David LaGrone, ACOE (Omaha District Office)
Matthew Bilodeau, ACOE (Wyoming Regulatory Office)
Diane Sipe, 8ENF-T





UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VIII

In the Matter of:

Robert Phillips and Teresa A. Phillips
3614 U.S. Highway 87
P.O. Box 54
Banner, Wyoming 82832,

Respondents.

FINDINGS OF VIOLATION
AND
ADMINISTRATIVE ORDER
FOR COMPLIANCE

Docket No. **CWA-08-2003-0101**

STATUTORY AUTHORITY

The following FINDINGS are made and the following action is ORDERED pursuant to the authority vested in the Administrator of the United States Environmental Protection Agency ("EPA") by Section 309 of the Clean Water Act (CWA or the "Act"), 33 U.S.C. §1319. These authorities have been properly delegated to the undersigned. The Order is based on the findings of violation of Section 301(a) of the Clean Water Act (33 U.S.C. § 1311(a)), which, among other things, prohibits the discharge of pollutants (*i.e.*, dredged or fill material) into waters of the United States, except as in compliance with a permit issued pursuant to section 404 of the CWA, 33 U.S.C. § 1344.

FINDINGS OF VIOLATION

1. Robert Phillips and Teresa A. Phillips (the "Respondents") are the owners and/or operators of the property located on or adjacent to Rifle Creek, in Banner, Wyoming. The property is generally described as being located in the western half of Section 20, Township 54, Range 83 West, in Sheridan County, Wyoming.
2. Robert Phillips and Teresa A. Phillips are each a "person" as defined in Section 502(5) of the CWA, 33 U.S.C. § 1362(5).
3. On January 30, 1998, Robert Phillips sent a letter to the Wyoming Regulatory Office of the Army Corps of Engineers' Omaha District requesting information about an exemption from the permitting requirements of Section 404 of the Clean Water Act for farming and ranching activities. Specifically, Robert Phillips requested an "except[ion]" on installing a culvert to cross



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the creek on our property. The crossing will be used for farm and ranch use only.”

4. On February 4, 1998, the Army Corps of Engineers (“ACOE”) responded to Robert Phillips’ request for a jurisdictional determination. The ACOE informed Mr. Phillips that although it regulates “the placement of dredge and fill material into wetlands and other waters of the United States” and discharges of such material associated with excavation activities such as mechanized landclearing, ditching and channelization, the ACOE determined that Mr. Phillips’ proposed project was not subject to ACOE regulation. The Corps relied on Mr. Phillips’ representation that he was building a single road crossing for farming and ranching purposes in determining that “the exemption found in 33 C.F.R. Part 323.4(a)(6) applied” and that a Section 404 permit was not required for the construction of Mr. Phillips’ proposed project. A copy of the regulations found at 33 C.F.R. §323.4 was provided to Mr. Phillips as an enclosure to the ACOE’s February 4, 1998 letter. These regulations state, in relevant part, that “[t]he road fill shall be bridged, culverted, or otherwise designed to prevent the restriction of expected flood flows” and that “[t]he design, construction, and maintenance of the road crossing shall not disrupt the migration or other movement of those species of aquatic life inhabiting the waterbody.”

5. On or before April 24, 2000, Mr. Tom Johnson of the ACOE’s Wyoming Regulatory Office received information that construction equipment was working in Rifle Creek, possibly to create fish habitat. On April 24, 2000, Mr. Johnson contacted Mr. Phillips who again represented to the Corps that he was only constructing a road crossing.

6. On May 26, 2000, Mr. Phillips submitted two (2) Applications for Permit to Appropriate Surface Water to the State of Wyoming State Engineer’s Office. These permit applications requested permission to construct dams and impound water in reservoirs along Rifle Creek. The “Rifle Creek #1” reservoir had a proposed capacity and surface area of 0.33 acres; the “Rifle Creek #2” reservoir had a proposed capacity and surface area of 0.19 acres. The permits were approved on September 24, 2000. On October 15, 2000, Teresa A. Phillips submitted a Notice of Completion of Construction to the Wyoming State Engineer’s Office certifying that the construction of the dams was complete.

7. On January 27, 2003, the ACOE received a citizen complaint and accompanying photographs, which showed that there were indeed two (2) dams, not the single road crossing Mr. Phillips represented to the Corps he was building. These dams were also impounding water with headgates to control water flow. Further, enclosed with this complainant’s letter was a real estate flyer which evidenced Mr. Phillips’ intent to subdivide the property for residential/recreational uses rather than for farming or ranching purposes.

8. Discharges of dredged and fill material occurred during the activities described in Paragraphs 5 and 6, above, and were performed using common earth moving equipment operated



by Respondents and/or their agents or contractors.

9. Rifle Creek and the adjacent wetlands are "navigable waters" within the meaning of section 502 of the Act, 33 U.S.C. § 1362.

10. Each piece of equipment used to undertake the activities referenced in Paragraph 5, above, is a "point source" within the meaning of the definition set forth in section 502(14) of the CWA, 33 U.S.C. § 1362(14).

11. The discharged materials referenced in Paragraph 8, above, are each a "pollutant" within the meaning of the definition set forth in section 502(6) of the CWA, 33 U.S.C. § 1362(6), and 40 C.F.R. § 230.2.

12. The placement of the discharged material into Rifle Creek and the adjacent wetlands constitutes a "discharge of pollutants" within the meaning of the definition set forth in section 502(12) of the CWA, 33 U.S.C. § 1362(12).

13. Respondents are therefore subject to provisions of the Act, including, but not limited to, sections 301(a), 308, 309(a), and 404, 33 U.S.C. §§ 1311(a), 1318, 1319(a), and 1344, respectively.

14. EPA and ACOE have determined that the discharges described in Paragraph 8, above, were carried out without the required authorization from the Corps pursuant to section 404 of the Act, 33 U.S.C. § 1344.

15. Each discharge of pollutants from a point source by the Respondents occurring between approximately April 1, 2000 and October 15, 2000 into "navigable waters" without first obtaining the requisite authorization pursuant to section 404 of the Act, 33 U.S.C. § 1344, constitutes a violation of section 301(a) of the Act, 33 U.S.C. § 1311(a).

16. Each day the discharges remain in the wetlands without the required permit issued pursuant to section 404 constitutes an additional day of violation of section 301 of the Act.

17. The removal of the dredged or fill material illegally discharged into Rifle Creek and the adjacent wetlands and restoration of the wetlands to a condition that closely resembles their condition prior to the discharge of the dredged or fill material can be achieved as a practical matter through commonly used construction, digging, revegetation and best management practices to protect water quality and the environment.

18. Activities to be carried out under this Order are remedial, not punitive, and are necessary



to achieve the Clean Water Act's objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." CWA section 101(a), 33 U.S.C. § 1251 (a). The removal and restoration described in Paragraph 17 above, is appropriate to alleviate actual and potential harm to water quality and aquatic habitat caused by the Respondents' unauthorized activities. The removal and restoration required by this Order is necessary to return the wetlands to their original function and value and to mitigate any damage to aquatic habitat in Rifle Creek.

19. These FINDINGS OF VIOLATION and the ORDER which follows have been made after consultation and coordination with the U. S. Army Corps of Engineers, Omaha District's Wyoming Regulatory Office.

ORDER

20. Based upon the foregoing FINDINGS OF VIOLATION, and pursuant to Sections 308 and 309(a), 33 U.S.C. §§ 1318 and 1319(a), it is hereby ordered that the Respondents shall come into compliance with the Clean Water Act by completing the following actions:

- a. Respondents shall immediately terminate any and all unauthorized discharges of dredged or fill material, now and in the future, to waters of the United States within, adjacent to or hydrologically connected to Rifle Creek, without prior authorization by the U.S. Army Corps of Engineers pursuant to a valid permit issued pursuant to section 404 of the Clean Water Act.
- b. Respondents shall not place any additional dredge or fill material in Rifle Creek or the adjacent wetlands for any purpose other than for performing work that is necessary to complete the actions required by this Order.
- c. No later than sixty calendar (60) days after the effective date of this Order, Respondents shall develop and submit to EPA a Restoration Plan for removing the dredged or fill material from Rifle Creek and the adjacent wetlands and restoring them to pre-impact conditions. The plan shall include:
 - i. A detailed work plan for restoring Rifle Creek and the adjacent wetlands to their pre-impact condition, including a schedule providing for completion of all aspects of the restoration work within 30 days;
 - ii. Drawings of each restoration site, including plan and profile drawings with control elevations;
 - iii. Specification of site(s) for the disposal of excess fill material removed from the wetlands;



- iv. Provisions for controlling noxious weed species;
- v. Provisions for monitoring revegetation success for five (5) years after the restoration work is completed; and
- vi. An evaluation of the aquatic habitat impacted by Respondents' activities and a detailed plan for mitigating the damage and/or restoring any aquatic habitat adversely affected by Respondents' activities.

The Restoration Plan shall be prepared in accordance with the General Guidelines for Removal and Restoration Plans attached as Exhibit A to this Order.

21. EPA, in its sole unreviewable discretion, shall have the option of approving the Restoration Plan, approving it with modifications, or rejecting it. If EPA rejects the Restoration Plan or approves it with modifications, EPA shall provide a written explanation of its reasons, and Respondents shall, according to a schedule set forth by EPA in its written explanation, submit a revised request for approval. In the event that the resubmitted submission is disapproved by EPA, EPA may again require Respondents to correct the deficiencies or EPA may amend the Restoration Plan.

22. Upon EPA's approval of the Restoration Plan, Respondents shall implement the Restoration Plan as approved by EPA and shall begin work in accordance with it no later than 30 days from the date of EPA's approval. The restoration work shall continue until completion unless EPA determines, in its sole unreviewable discretion, and notifies Respondents that conditions at the site preclude completing the work according to the terms to be specified in the Restoration Plan. If the restoration work is delayed or interrupted, the work shall resume as soon as practicable after such delay or interruption ceases and shall be extended no more than the amount of time caused by the delay.

23. The Restoration Plan shall be prepared by, and all restoration work shall be supervised by, a qualified environmental consultant. Respondents shall make arrangements for and pay all the costs of the environmental consultant and any contractor(s) performing the work. A statement of the consultant's qualifications, including professional resume and business references, shall be submitted to EPA within fourteen (14) calendar days of receipt of this Order.

24. Any deliverables, plans, reports, specifications, schedules and attachments required by this Order are, upon approval by EPA, incorporated into this Order. Any non-compliance with such EPA-approved deliverables, plans, reports, specifications, schedules, and attachments shall



be deemed a failure to comply with this Administrative Order and may subject Respondents to further EPA enforcement action(s).

25. This Order is not a permit or an authorization to place or discharge dredged or fill material in to waters of the United States. Respondents shall consult with the U.S. Army Corps of Engineers, Omaha District, Wyoming Regulatory Office located at 2232 Dell Range Boulevard, Suite 210, Cheyenne, Wyoming 82009-4942 to determine if any work to be performed pursuant to this Order requires a permit from the Corps of Engineers under section 404 of the Clean Water Act. If necessary, such a permit shall be obtained prior to implementing the work.

26. Respondents shall allow or use their best efforts to allow access by any authorized representatives of EPA, ACOE, the U. S. Forest Service, the U.S. Fish and Wildlife Service, the Wyoming DEQ, and the Wyoming Division of Wildlife, upon proper presentation of credentials, to sites and records relevant to this Order for any of the following purposes:

- a. To inspect and monitor progress of the activities required by this Order;
- b. To inspect and monitor compliance with this Order; and
- c. To verify data submitted to EPA.

This Order shall in no way limit or otherwise affect EPA's authority to enter, conduct inspections, have access to records, or monitor compliance pursuant to any statute, regulation, permit, or court order.

27. Respondents shall submit all notifications and correspondence to:

Diane L. Sipe, Director
Technical Enforcement Program
Office of Enforcement, Compliance and Environmental Justice (8ENF-T)
U.S. Environmental Protection Agency,
Region 8
999 18th Street
Denver, Colorado 80202-2466
Telephone: (303) 312-6391
Facsimile: (303) 312-6409

28. This Administrative Order shall be effective upon receipt by the Respondents. Not more than five (5) business days after receipt of this Order, Respondents shall inform EPA in writing of Respondents' intent to fully comply with this Order. EPA requests Respondents meet with



EPA if there are concerns or questions about the requirements of this Administrative Order.

29. Failure to comply with this Order may subject Respondents to civil penalties under the Act. 33 U.S.C. §1319(d) authorizes civil penalties of up to \$27,500 per day for each violation of the Clean Water Act section 301, 33 U.S.C. § 1311. Section 309(g), 33 U.S.C. § 1319(g) authorizes EPA to impose administrative penalties for violations of the Act. Issuance of this Order shall not be deemed to be an election by the United States to forego any civil or criminal action to seek penalties, fines, or other appropriate relief under the Clean Water Act for violations giving rise to the Order.

30. Compliance with the terms and conditions of the Order shall not be construed to relieve the Respondents of their obligations to comply with any applicable federal, state or local law.

IT IS SO ORDERED:

9/30/03

Date

SIGNED

Carol Rushin
Assistant Regional Administrator
Office of Enforcement, Compliance and
Environmental Justice

IF YOU WOULD LIKE COPIES OF THE ATTACHMENTS, PLEASE CONTACT THE REGIONAL HEARING CLERK.

THIS DOCUMENT WAS FILED IN THE RHC'S OFFICE ON SEPTEMBER 30, 2003.



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